

STATE OF MICHIGAN
COURT OF APPEALS

CAMILLE A. PRINCE, by her Next Friend
LAWRENCE A. NOLAN,

UNPUBLISHED
December 19, 1997

Plaintiff-Appellant,

v

No. 196413
Court of Claims
LC No. 93-014998-CM

BOARD OF TRUSTEES OF MICHIGAN STATE
UNIVERSITY,

Defendant-Appellee.

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right from a judgment entered in favor of defendant following a bench trial in the Court of Claims. We affirm in part, reverse in part, and remand for further proceedings.

The case arises out of a traffic accident that occurred on September 26, 1990, at 8:54 a.m. at the intersection of Farm Lane Road and Auditorium Road on the campus of Michigan State University. The only traffic control devices at the intersection are stop signs for traffic on Auditorium Road. Plaintiff was driving a Honda Spree moped in the southbound lane on Auditorium Road. Karen Burtka was driving a Chevrolet Caprice station wagon northbound on Farm Lane Road. Burtka approached the intersection to make a left hand turn onto Auditorium Road. It was disputed whether she stopped at the intersection before proceeding with her turn.² In any event, Burtka did not see plaintiff on her moped, and plaintiff was unable to avoid Burtka's vehicle. Plaintiff struck the rear passenger side of Burtka's station wagon. Apparently, plaintiff's head struck the vehicle, plaintiff fell backward, and the moped fell on top of plaintiff. Plaintiff suffered severe injuries as a result, including a permanent closed head injury.

Plaintiff filed suit against Karen Burtka, Joseph F. Burtka (Karen's father as the owner of the vehicle), and Michigan State University as the governmental entity with jurisdiction over the roadways. The claim against the Burtkas was settled before trial. The claim against defendant was based on the highway exception of the governmental tort liability act, MCL 691.1402; MSA 4.996(102). Specifically, plaintiff alleged that defendant "constructed and maintained the intersection without adequate traffic control devices to safely guide vehicular movement in light of the high volume of

vehicular, bicycle and moped traffic using the intersection and its accident history.” Before trial, the trial court granted in part defendant’s motion for summary disposition. The trial court ruled that plaintiff’s claim premised upon the absence of traffic signs was dismissed, but that plaintiff’s claim premised upon the allegedly defective design of the intersection would not be dismissed.

The case went to a bench trial regarding the defective design issue. In an opinion and order dated June 12, 1996, the trial court ruled that the absence of a fifth turn lane could not be the basis of a finding of liability based on the authority of *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579; 546 NW2d 690 (1996).³ The trial court also noted in its opinion that plaintiff’s injuries “were not a result of [defendant’s] violation of its statutory duty, both because the intersection was reasonably safe and because the accident and resulting injuries occurred due to operator (Burtka) error.”

On appeal, plaintiff raises four issues. She contends that the trial court erred in granting summary disposition to defendant regarding the failure to provide adequate traffic signs claim in light of the Supreme Court’s decision in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996). She also contends that the case should be remanded for a new trial regarding the claims that the intersection was not reasonably safe because of inadequate traffic control devices and the design of the intersection, or a combination of both factors, again in light of *Pick*. She also argues that the trial court erred in relying on *Wechsler* to rule that the absence of a left turn lane could not be a basis for liability. Finally, she argues that the trial court erred in denying her motion in limine to exclude evidence of her nonuse of a helmet while operating the moped.

I

First, we agree with plaintiff that the trial court erred in granting summary disposition in favor of defendant regarding plaintiff’s claim of failure to provide adequate traffic control devices. In *Pick, supra*, p 624, our Supreme Court held that a duty is imposed on governmental agencies to provide traffic control devices or warning signs at, or in regard to, points of hazard affecting roadways within their jurisdiction. The Court defined a “point of hazard” as any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe. Further, the condition must be one that uniquely affects vehicular travel on the improved portion of the roadway, although such conditions need not be physically part of the roadbed itself. *Id.*, p 623.

We acknowledge that the Supreme Court’s decision in *Pick* had not been released when the trial court ruled on the motion for summary disposition. Therefore, we must reverse the grant of summary disposition in favor of defendant with respect to the claim of failure to install adequate traffic control devices and remand for further proceedings in light of *Pick*.

We specifically reject defendant’s contention that this case need not be remanded because of the trial court’s ruling in its opinion and order that the intersection was reasonably safe. First, we disagree with defendant that plaintiff had only one theory of liability. A fair reading of the complaint indicates that plaintiff alleged two theories: that of design defect and failure to install adequate traffic control devices. See, e.g., *Pick, supra*, p 615. Moreover, the trial court treated these theories as

separate when it dismissed the claim of failure to install adequate traffic control devices, but denied summary disposition with respect to the design defect claim.

Further, the trial court's ruling that the intersection was reasonably safe did not take into account plaintiff's claim of failure to install adequate traffic control devices. In addition, following trial, plaintiff moved to reinstate the failure to install claim. The trial court denied the motion, but stated the following:

First, I don't agree with [defense counsel] that I have evaluated the safety of the intersection in its entirety. I did not because of my previous ruling. I evaluated the safety of the intersection with respect to a design flaw occasioned by the lack of a center lane. It is true that if another trial were held, it is possible the Court would find that the evidence of experts, presented by Plaintiff, who asserted the lack of a traffic signal as opposed to a traffic stop sign was sufficient to render the intersection unsafe.

But even if the Court made that finding, I would have to then make a finding that the unsafeness of the intersection was a proximate cause of the accident. And what I found and what I believed, and it was not a decision I came to lightly, was that Karen Burtka's actions were the sole proximate cause of the accident. So even if I had found, as Plaintiff argued, that the intersection was unsafe because it didn't have a middle turn lane, the proximate cause issue would still be missing.

To the extent that the trial court found that Burtka's actions were the sole proximate cause of the injury, we believe that the trial court's ruling was premature. First, the trial court acknowledged that there could be evidence that the intersection was unsafe because of a lack of adequate signage. Thus, plaintiff is entitled to present her evidence on this issue before the trial court determines the issue of proximate cause. See generally, *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994). Moreover, there may be more than one proximate cause of plaintiff's injury. See *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994). Accordingly, we reverse the grant of summary disposition in favor of defendant with respect to plaintiff's claim of failure to install adequate traffic control devices and remand for further proceedings.

II

Plaintiff next claims that the case should be remanded for a new trial regarding her claims of design defect and inadequate traffic control devices, or both, in light of *Pick*. While we agree that the trial court erred in granting summary disposition to defendant with respect to the claim of inadequate traffic control devices for the reasons set forth in Issue I, *infra*, we do not find that plaintiff is entitled to a new trial with respect to the design defect claim.

The Supreme Court's decision in *Pick* was narrow and concerned only the issue of the duty to provide adequate warning signs or traffic control devices at known points of hazard. We read nothing in *Pick* which concerns the trial court's ruling with respect to plaintiff's design defect claim. Therefore, *Pick* does not mandate a remand for a new trial with respect to plaintiff's design defect claim. The decision in *Pick* only affects plaintiff's claim of failure to install traffic control devices at the intersection.

III

Plaintiff next contends that the trial court erred in relying on *Wechsler* to rule that the absence of a left turn lane could not be a basis for liability under the highway exception to governmental tort immunity. Plaintiff contends that *Wechsler* has been overruled by the Supreme Court's ruling in *Pick*.

This Court's decision in *Wechsler* involved several issues. One issue did involve a claim of inadequate traffic control devices. Because the Court's decision in *Pick* involved only the issue of a governmental agency's duty to provide traffic control devices or warning signs at, or in regard to, points of hazard affecting roadways, we believe that the issues in *Wechsler* that did not involve traffic control devices were not overruled by *Pick*. We recognize that the Supreme Court did remand *Wechsler* for reconsideration in light of *Pick*, but can discern nothing in *Pick* that would affect the issues not involving traffic control devices. Therefore, we believe that the trial court's reliance on *Wechsler* with respect to plaintiff's claim of failure to add a turn lane was appropriate and that the decision in *Wechsler* in this regard has not been affected. This Court in *Wechsler*, *supra*, p 588, held that no case authority and no statutory language supported the concept that failure to construct additional lanes of traffic can provide a basis for imposing liability on a governmental agency having jurisdiction over a highway, and that the contrary was the rule. Accord, *Hall v Dep't of State Hwys*, 109 Mich App 592, 605; 311 NW2d 813 (1981).

Moreover, we note that the trial court specifically found that the intersection was reasonably safe as a matter of fact. Accordingly, we do not find that plaintiff has identified a basis for reversal of the trial court's judgment in favor of defendant with respect to the claim of design defect.

IV

Lastly, plaintiff argues that the trial court abused its discretion in denying her motion in limine to exclude evidence of her nonuse of a helmet while she was operating the moped. We find no such abuse of discretion in the trial court's decision to allow evidence of plaintiff's failure to wear a helmet while operating her moped.

MCL 257.658(4); MSA 9.2358(4) provides that a person operating or riding a motorcycle, and any person less than nineteen years of age operating a moped on a public thoroughfare, shall wear a crash helmet. Here, plaintiff was nineteen years old at the time of the accident, and was not wearing a helmet. Although plaintiff's conduct did not violate any statutory provision, we find no error in the trial court's decision to allow evidence that plaintiff was not wearing a helmet.

While there is no statutory duty on plaintiff to have worn a helmet, the duty element of common law negligence is not dependent on the existence and violation of a statute. *Lowe v Estate Motors Ltd*, 428 Mich 439, 464; 410 NW2d 706 (1987). Specifically, in *Lowe*, *supra*, p 455, the Supreme Court held that evidence of the existence of a failure to use seat belts may be admissible in a products liability action to support an affirmative defense of comparative negligence. Thus, the trier of fact may not be precluded, as a matter of law, from considering a failure to use a seat belt to determine whether the plaintiff exercised reasonable care under the circumstances for his or her own safety.

Likewise, in the present case, the trier of fact should not have been precluded, as a matter of law, from considering plaintiff's failure to wear a helmet to determine whether she exercised reasonable care under the circumstances for her own safety. Therefore, we find no abuse of discretion in the trial court's decision to admit evidence of plaintiff's nonuse of a helmet at the time of the accident.

The trial court's grant of summary disposition in favor of defendant with respect to the claim of failure to install adequate traffic control devices at the intersection is reversed and we remand for further proceedings on that claim in light of *Pick*. The trial court's judgment in favor of defendant with respect to the claim of design defect is affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings. Jurisdiction is not retained. No taxable costs pursuant to MCR 7.219, none of the parties having prevailed in full.

/s/ Kathleen Jansen

/s/ Martin M. Doctoroff

/s/ Hilda R. Gage

¹ In this opinion, "plaintiff" will refer solely to Camille A. Prince because she is the injured party.

² The trial court, however, resolved this factual dispute by finding that Burtka did not stop before making the left turn onto Auditorium.

³ We note that our Supreme Court remanded *Wechsler* to this Court for reconsideration in light of its decision in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996). See 455 Mich 862 (1997). However, according to this Court's docket entries, the parties have stipulated to dismiss the appeal on remand.